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IN THE

Supreme Court of the United States

No. 197....

OCTOBER TERM, A. D. 1950.

ALEXANDER PORHOWNIK and 25 TRINITY CORPORATION,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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and

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SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
I.—Summary Statement of the Matter Involved	1
II.—Jurisdictional Statement	2
III.—Specification of Errors to Be Urged	3
IV.—Questions Presented	3
V.—Reasons Relied on for the Allowance of the Writ	4
Brief in Support of Petition	7
Statement of the Case	7
Opinions of Courts Below	8
Jurisdiction	9
Specification of Errors	9
Argument	11
Summary of Argument	11
POINT A.—The defendant, Alexander Porhownik, should not be made a defendant in this action	13
POINT B.—The United States Court of Appeals for the Second Circuit erred in holding that the Section 204(b)(3) of the Housing and Rent Act of 1949 is constitutional	13
POINT C.—The United States Court of Appeals for the Second Circuit erred in not holding that according to the evidence presented by the plaintiff-appellee Section 204(b)(3) of the Housing and Rent Act of 1949 was intended to be enacted in breach of a previous guaranty by the legislation and as such could not constitute due process of law	20

PAGE

POINT D.—The United States Court of Appeals for the Second Circuit erred in not holding that according to the plaintiff-appellee's contention Section 204(b)(3) of the Housing and Rent Act of 1949 might be considered intended as class legislation and therefore unconstitutional 22

POINT E.—The United States Court of Appeals erred in not holding that the decisions cited in the opinion of the District Judge are not applicable to the instant case and do not constitute due process in the instant case 23

POINT F.—The United States Court of Appeals for the Second Circuit erred in not holding that Section 204(b)(3) is not applicable to the leases in questicon 26

POINT G.—The United States Court of Appeals for the Second Circuit erred in not applying in this case the Section 204(b)(2) of the Housing and Rent Act of 1949 27

POINT H.—The United States Court of Appeals for the Second Circuit erred in not applying to this case Regulation of the Housing Expediter 825.24 (b) and Paragraph 3 of the "Rent Control Facts for Landlords" 28

POINT I.—The United States Court of Appeals erred in not holding that the two leases made by the defendant, 25 Trinity Corporation, are valid leases and the rental mentioned in these leases is the legal maximum rent which the defendant, 25 Trinity Corporation, has the right to collect from the above-mentioned two tenants after April 1, 1949 29

PAGE

POINT J.—The United States Court of Appeals for the Second Circuit erred in not holding that no relief for injunction should be granted in this action or said relief should be in a different scope 31

POINT K.—The United States Court of Appeals for the Second Circuit erred in not holding that the provision of the Housing and Rent Act of 1949 that the plaintiff is not subject to costs makes undue difference between the parties to the action and violates due process of law 32

POINT L.—The United States Court of Appeals for the Second Circuit erred in not holding that the Housing and Rent Act of 1949 is unconstitutional *in toto* or in several parts applicable to this case 33

Conclusion 33

CASES CITED.

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210 14
Cobleigh v. Woods, 172 F. 2nd 167 23
Connally v. General Construction Co., 269 U. S. 385 14
Cline v. Frink Dairy Co., 274 U. S. 443, 454 14
Francisco v. Board of Dental Examiners, Tex., Cir. App. 1941, 149 S. W. 2nd 619 13
Hoover v. McChesney, C. C. Ky. 1897, S. F. 412... 14
Johnson v. U. S., 79 F. Supp. 208 24
Meyers v. Schields, C. C. Ohio 1894, 61 F. 713 14
Miller v. Howe Sound Min. Co., 77 F. Supp. 540... 24, 25

PAGE

Schechter Corporation v. United States, 295 U. S. 495, 528 ..... 9, 23

Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 14

Smith v. Cahoon, 283 U. S. 553, 564 14

Seese v. Bethlehem Steel Co., 74 F. Supp. 412 25

Taylor v. Brown, 137 F. 2nd 654 ..... 23, 24

United States v. Ballard, 12 F. Supp. 321 ....14, 15, 16, 18

United States v. L. Cohen Grocery Co., 255 U. S. 81, 89 14

Wasservogel v. Meyerowitz, 300 N. Y. 125 16

In the Matter of Application of Rutherford Estates Lim., App. Div., First Dept., N. Y., Decided May 23, 1950 19

STATUTES CITED.

The Housing and Rent Act of 1949 ..... 8, 28

Subsection 204 (B) of the Housing and Rent Act of 1947 .....2, 4, 7, 29

U. S. Housing and Rent Act of 1948 8

Section 204 (b)(3) of the Housing and Rent Act of 1949 .....2, 3, 4, 9, 10, 16, 17, 18, 20, 22, 26, 27

Section 204 (b)(2) of the Housing and Rent Act of 1949 .....3, 9, 10, 13, 27

REGULATION CITED.

Regulation 825.24(b) of the Housing Expediter and §3 of the "Rent Control Facts for Landlords" 4, 28

IN THE

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October Term, A. D. 1950.

ALEXANDER PORHOWNIK and 25 TRINITY CORPORATION,

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

The facts of the case are in brief as follows:

Two leases were entered into between 25 Trinity Corporation, Landlord, and two new tenants in the period between January 1st and April 1st, 1948, pursuant to

permission granted by the subsection 204(B) of the Housing and Rent Act of 1947 at the voluntary agreed rent between landlord and tenants. The Housing Expediter contends that the rent of these leases shall from April 1, 1949, roll back to the rent of the leases entered into in the year 1947 with two prior different tenants. The defendants argue that there is no law authorizing such rolling back of the rent. More particularly the facts are explained in the attached brief.

On October 28, 1949, the District Court entered a judgment for an injunction against the Corporate defendant and for the refund from April 1, 1949 of the difference between the lease rent and the rent claimed by the Housing Expediter to be the maximum rent, to-wit: the rent of the leases entered into with different tenants in the year 1947.

On May 24, 1950, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court and on June 9, 1950, denied a petition for a rehearing.

The question is presented whether the Section 204(b)(3) of the Housing and Rent Act of 1949 should apply to these two leases as the plaintiff contends and should roll back the rent from April 1, 1949, to the level of the rent of the prior leases to different tenants in the year 1947, and if this Section should so apply, whether this Section is constitutional and constitutes due process sufficient to deprive the landlord of its property.

II.

Jurisdictional Statement.

In this case the petitioners question the constitutionality of the Section 204(b)(3) of the Housing and Rent Act of 1949, and other sections of this Act applicable

to their case, and therefore are properly before the United States Supreme Court. There being a question of constitutionality of a law this case is within the Jurisdiction of the United States Supreme Court.

III.

Specification of Errors to Be Urged.

The errors which are urged as the ground for reversal of the judgment of the United States Court of Appeals for the Second Circuit are:

1. The United States Court of Appeals erred in affirming the judgment of the District Court.

2. It erred in holding that the Section 204(b)(3) of the Housing and Rent Act of 1949 is applicable to this case.

3. It erred in holding that the Section 204(b)(3) and other sections of the Housing and Rent Act of 1949 applicable to this case are constitutional.

IV.

Questions Presented.

The questions herein presented are:

1. Whether the Section 204(b)(3) of the Housing and Rent Act of 1949 is applicable to this case.

2. Whether this Section is constitutional: (a) as enacted, and (b) as applied.

3. Whether Section 204(b)(2) of the Housing and Rent Act of 1949 should be applicable to this case.

4. Whether the Regulations of the Housing Expediter 825.24 (b) and paragraph 3 of the release entitled "Rent Control Facts for Landlords" issued by the Housing Expediter are applicable to this case.

5. Whether the leases entered into by the defendant 25 Trinity Corporation according to subsection 204(B) of the Housing and Rent Act of 1947 remained valid and lawful leases after April 1, 1949.

6. Whether an injunction should have been issued in this action, and the scope of it.

7. Whether the Housing and Rent Act of 1949 is unconstitutional *in toto;* or in any one or more parts thereof applicable to this case.

8. Whether Alexander Porhownik was properly made a defendant in this action.

V.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals for the Second Circuit, if permitted to stand, will serve as authority for the deprivation of the right of petitioner 25 Trinity Corporation and several thousands of other landlords similarly situated to hold their leases which were validly and lawfully entered into between January 1st and April 1st, 1948, as their lawful property, and not to have them impaired by the government. It will also operate to deprive them of the rents provided in said leases, lawfully agreed upon pursuant to subsection 204(B) of the Housing and Rent Act of 1947 between the landlords and the tenants.

2. The United States Court of Appeals for the Second Circuit has decided an important question of Federal law, which has not been, but should be, settled by this Court.

3. The United States Court of Appeals for the Second Circuit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

4. The United States Court of Appeals for the Second Circuit has decided an important question of law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket No. 21590, *United States of America, plaintiff-appellee* v. *Alexander Porhownik and 25 Trinity Corporation, defendants-appellants,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Second Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated: July 12, 1950.

ALEXANDER PORHOWNIK and
25 TRINITY CORPORATION,
Petitioners,

by: ALEXANDER PORHOWNIK and
ALBERT VIAULT,
Counsels for Petitioners.

LYMAN STANSKY, ESQ.,
NAOMI WHEELER, ESQ.,
Of Counsel.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The defendant, 25 Trinity Corporation, is the owner of the premises designated as 21 and 25 Trinity Place, Montclair, N. J., consisting of 32 large modern apartments on one of the best streets of Montclair, and the defendant, Alexander Porhownik, is a Counselor-at-Law duly admitted to the practice in the State of New York and in Federal Courts and is the President of the defendant, 25 Trinity Corporation.

Pursuant to the Subsection 204(b) of the Housing and Rent Act of 1947, defendant, 25 Trinity Corporation, in the second half of the year 1947 made thirty-one valid leases and amongst them two leases, with two tenants in apartments 204 and 402, Mr. Moses and Mr. Reichert, and filed them with the Office of Housing Expediter. These leases were to expire December 31, 1948, but in January, 1948, both tenants surrendered their leases and moved out from Montclair, whereupon new leases were entered into between the landlord, 25 Trinity Corporation, and two new tenants, Mr. Halpin and Mr. Martin, both of whom obtained large pecuniary profits in leasing these two apartments and, although the law did not make obligatory the filing of new leases, they were filed with the Office of the Housing Expediter (Record, fol. 37).

Pursuant to the last paragraph of the subsection 204(B) of the Housing and Rent Act of 1947, these two new leases were *free from the maximum rent limitation* established by the Housing and Rent Act of 1947.

The subsequent U. S. Housing and Rent Act of 1948 did not mention or touch these two leases and they remained effective as valid leases. The Housing and Rent Act of 1949, also does not mention or touch such leases, but the Office of the Housing Expediter interprets the Housing and Rent Act of 1949 as a law which limits the rent of such leases to the rent of the previous leases filed with the Office of the Housing Expediter in the year 1947 entered into with two prior different tenants.

As the rent under a valid lease is the property of the defendant, 25 Trinity Corporation, such rent cannot be taken away or reduced without due process of law.

The defendant, 25 Trinity Corporation, concedes that a valid, constitutional law may take its property away but contends that in such deprivation the law should *be direct and explicit* and that its property cannot be taken away by a mere *remote interpretation* of the law or *inference from the law.*

The contention of the defendant, 25 Trinity Corporation, is that *there is no such direct and explicit law* in this case.

Opinions of the Court Below.

On October 4, 1949, a motion for summary judgment and a cross-motion to dismiss the complaint came before District Judge Sylvester J. Ryan.

Sylvan D. Freeman, Esq., Walter S. Fried, Esq., of counsel, appeared for the plaintiff and Alexander Porhownik, Esq., Phillips Mahoney and Spohr, Esqs., by Jay-Ehret Mahoney and Pasquale E. Conforti, Esqs., of counsel, appeared in behalf of the defendants.

A judgment was rendered on October 28, 1949 granting an injunction against the Corporate defendant restraining it from collecting rents in excess of the maximum legal rents and directing the refund to John H. Halpin of $105 and to Isham L. Martin $93 with $39.48 costs (Record, fols. 20, 21).

On May 24, 1950 the United States Court of Appeals for the Second Circuit affirmed the decision of the District Court and on June 9, 1950 denied a petition for rehearing (Record, fols. 42, 50).

Jurisdiction.

1. The date of the judgment to be reviewed is May 24, 1950.

2. The petitioners question the constitutionality of the Section 204(b)(3) of the Housing and Rent Act of 1949 and other sections of this Act as applicable to their case.

3. There being a question of constitutionality of a law this case is within the Jurisdiction of the United States Supreme Court.

4. The case believed to sustain said jurisdiction is *Schechter Corporation* v. *United States*, 295 U. S. 495.

Specification of Errors.

1. The defendant, Alexander Porhownik, should not be made a defendant in this action.

2. The United States Court of Appeals for the Second Circuit erred in holding that the Section 204(b)(3) of the Housing and Rent Act of 1949 is constitutional.

3. The United States Court of Appeals for the Second Circuit erred in not holding that according to the evidence presented by the plaintiff-appellee Section 204(b)(3) of the Housing and Rent Act of 1949 was intended to be enacted in breach of a previous guaranty by the Legislation and as such could not constitute due process of law.

4. The United States Court of Appeals for the Second Circuit erred in not holding that Section 204(b)(3) of the Housing and Rent Act of 1949 might be considered intended as a class legislation and therefore unconstitutional.

5. The United States Court of Appeals for the Second Circuit erred in not holding that the decisions cited in the opinion of the District Judge are not applicable to the instant case and do not constitute due process in the instant case.

6. The United States Court of Appeals for the Second Circuit erred in holding that the Section 204(b)(3) of the Housing and Rent Act of 1949 is applicable to this case.

7. The United States Court of Appeals for the Second Circuit erred in holding that Section 204(b)(2) of the Housing and Rent Act of 1949 is not applicable to the leases in question.

8. The United States Court of Appeals for the Second Circut erred in not applying the Regulations of the Housing Expediter mentioned below.

9. The United States Court of Appeals for the Second Circuit erred in holding that the two leases entered into by the defendant, 25 Trinity Corporation, are not valid leases and that the rent mentioned in these leases is not the maximum legal rent which the defendant, 25 Trinity Corporation, has a right to collect from the two tenants above mentioned after April 1, 1949.

10. The United States Court of Appeals for the Second Circuit erred in holding that the injunction is necessary in this case and that said injunction as expressed in the judgment is not in variance with the opinion of the District Court.

11. The United States Court of Appeals for the Second Circuit erred in not holding that the provision of the Housing and Rent Act of 1949 that the plaintiff is not subject to costs makes undue difference between the parties to the action and violates due process of law.

12. The United States Court of Appeals for the Second Circuit erred in not holding that the Housing and Rent Act of 1949 is unconstitutional *in toto* or in several parts applicable to the instant case.

ARGUMENT.

Summary of Argument.

Point A.

The defendant, Alexander Porhownik, should not be made a defendant in this action.

Point B.

The United States Court of Appeals for the Second Circuit erred in holding that the Section 204(b)(3) of the Housing and Rent Act of 1949 is constitutional.

Point C.

The United States Court of Appeals for the Second Circuit erred in not holding that according to the evidence presented by the plaintiff-appellee Section 204(b)(3) of the Housing and Rent Act of 1949 was intended to be enacted in breach of a previous guaranty by the legislation and as such could not constitute due process of law.

Point D.

The United States Court of Appeals for the Second Circuit erred in not holding that according to the plaintiff-appellee's contention Section 204(b)(3) of the Housing and Rent Act of 1949 might be considered intended as class legislation and therefore unconstitutional.

POINT E.

The United States Court of Appeals erred in not holding that the decisions cited in the opinion of the District Judge are not applicable to the instant case and do not constitute due process in the instant case.

POINT F.

The United States Court of Appeals for the Second Circuit erred in not holding that Section 204(b)(3) is not applicable to the leases in question.

POINT G.

The United States Court of Appeals for the Second Circuit erred in not applying in this case the Section 204(b)(2) of the Housing and Rent Act of 1949.

POINT H.

The United States Court of Appeals for the Second Circuit erred in not applying to this case Regulation of the Housing Expediter 825.24 (b) and Paragraph 3 of the "Rent Control Facts for Landlords".

POINT I.

The United States Court of Appeals erred in not holding that the two leases made by the defendant, 25 Trinity Corporation, are valid leases and the rental mentioned in these leases is the maximum legal rent which the defendant, 25 Trinity Corporation, has the right to collect from the above-mentioned two tenants after April 1, 1949.

POINT J.

The United States Court of Appeals for the Second Circuit erred in not holding that no relief for injunction should be granted in this action or said relief should be in a different scope.

POINT K.

The United States Court of Appeals for the Second Circuit erred in not holding that the provision of the Housing and Rent Act of 1949 that the plaintiff is not subject to costs makes undue difference between the parties to the action and violates due process of law.

POINT L.

The United States Court of Appeals for the Second Circuit erred in not holding that the Housing and Rent Act of 1949 is unconstitutional *in toto* or in several parts applicable to this case.

POINT A.

The defendant, Alexander Porhownik, should not be made a defendant in this action.

The defendant, Alexander Porhownik, is only the President of the owner Corporation and the leases in question were made between *the tenants and the defendant, 25 Trinity Corporation,* and not *with the defendant,* Alexander Porhownik.

POINT B.

The United States Court of Appeals for the Second Circuit erred in holding that the Section 204(b)(3) of the Housing and Rent Act of 1949 is constitutional.

Due process of law permits the deprivation of property only by a direct and explicit law and not otherwise. There are many decisions by the Federal Courts to this effect:

Francisco v. *Board of Dental Examiners,* Tex. Civ. App. 1941, 149 S. W. 2nd 619.

"The requirements of 'due process of law' extend to every case of the exercise of governmental power."

Hoover v. *McChesney,* C. C. Ky. 1897 S. F. 412 and *Meyers* v. *Schields,* C. C. Ohio 1894, 61 F. 713.

"Every citizen should hold his life, liberty and property and immunities under the protection of general rules which govern society" (Webster).

United States v. *Ballard,* 12 F. Supp. 321.

In this very important decision the Court said on page 326:

Statute which is "in terms so vague that men of common intelligence must necessarily guess its meaning and differ as to its application violates the first principles of due process of law."

This decision cites to the same effect:

Champlin Refining Co. v. *Corporation Commission,* 286 U. S. 210;
Connally v. *General Construction Co.,* 269 U. S. 385;
United States v. *L. Cohen Grocery Co.,* 255 U. S. 81, 89;
Small Co. v. *American Sugar Refining Co.,* 267 U. S. 233, 239;
Cline v. *Frink Dairy Co.,* 274 U. S. 443, 454;
Smith v. *Cahoon,* 283 U. S. 553, 564.

There are several other decisions to the same effect.

It follows from the above citations that unless there is a *clear and explicit* law no citizen can be deprived of his life, liberty *and property.* If there is no such direct and explicit law for deprivation of life, liberty and prop-

erty such deprivation can not be considered to be "under protection of general rules which govern society."

The District Judge and the United States Court of Appeals for the Second Circuit had to take into consideration that there are two classes of law:

1. The laws regulating the relations between the citizens.
2. The laws regulating the relations between the citizens and the Government and depriving the citizens of their life, liberty and property.

When law regulates relations between citizens it might not be clear and distinct. That is one of the reasons why we have Courts. One citizen believes that the law should be interpreted one way, another in a different way; and the Court will decide who is right.

It is quite a different situation when the Government wants to deprive a citizen of his life, liberty and property. In this class of laws, the law so depriving a citizen should be a clear and distinct one and if "men of common intelligence must necessarily guess its meaning and differ as to its application" such law cannot deprive a citizen of his property without violating the first principles of due process of law (*U. S.* v. *Ballard, supra*).

The present case is one of the second class of laws. The District Judge and the United States Court of Appeals for the Second Circuit have applied to the leases of Martin and Halpin the above mentioned Section 204(b)(3) notwithstanding that here is a case when "men of common intelligence must necessarily guess its meaning and differ as to its application".

We can easily see that here is a case of such difference in the application of this section. The article (see correspondence) in the New York Law Journal of May 20, 1949, page 1808, differs with the Housing Expediter

as to the application of this section to leases in question. I consider myself a man of common intelligence. I have appeared in this action as attorney for the defendants (Phillips Mahoney & Spohr, Esqs., as of counsel) and I am differing with the Housing Expediter as to the application of this section. In the Federal Courts of the State of New Jersey, attorneys have differed with the Housing Expediter as to the application of this section (*U. S.* v. *George J. Wagner,* U. S. District Court, Newark, Civil 607-49). There is a proceeding in the Office of the Housing Expediter, Borough of Brooklyn, where an attorney, Irving Honigsberg, Esq., differs in the application of this section with the Housing Expediter. A certain attorney, Mr. McLaughlin, has differed in its application in a proceeding in the Office of the Housing Expediter at 350 Fifth Avenue, New York. The attorneys for the Real Estate Board and for the Metropolitan Fair Rent Committee of New York also differ with the Housing Expediter in the application of Section 204(b)(3) to this class of cases. There are surely several other cases well known to the attorneys for the plaintiff-respondent where the attorneys for the landlords have differed in the application of this section with the Housing Expediter.

If we believe that all these gentlemen are "men of common intelligence" as mentioned in *U. S.* v. *Ballard, supra,* then we should find that this case comes exactly under the law set forth in *U. S.* v. *Ballard* and that the application of Section 204(b)(3) to the above mentioned leases will violate "the first principles of due process of law."

In a recent decision of the New York Court of Appeals (*Wasservogel* v. *Meyerowitz,* 300 N. Y. 125), decided December 29, 1949, the Court said:

> "It may be that as to a landlord forced to keep a tenant, due process requires *that he have a court review* of any claim he may make that a reduction

of rent, or refusal to allow an increase *is confiscatory.*"

In the present case the District Judge and the United States Court of Appeals ordered a reduction of rent *which is confiscatory* as to the landlord. They tried to base such judgment on Congressional Records (so called questions and answers by the Housing Expediter) (Record, fols. 17, 39), but it is well known that many speeches and many statements are inserted in Congressional Records just for the record's sake though they never have been actually made in Congress. For a confiscatory law it is not so important what Congressional Records hold and what the opinion of the Housing Expediter is, but what *is written in the law.* In this case the law *nowhere expressly* authorized such reduction of rent as was made by the District Judge and the United States Court of Appeals.

Moreover, the Judges of the District Court and the United States Court of Appeals could not agree as to clarity of the Section 204(b)(3) of the Housing and Rent Act of 1949.

The District Judge granting the judgment against the defendants in this case stated (Record, fol. 19) "but, we hold that Section 204(b)(3) is direct and explicit and applicable to this case."

The three learned Judges of the Court of Appeals stated in their opinion (Record, fol. 40) concerning the same Section that "the proper understanding of the language does demand a somewhat exacting scrutiny", that its language "is full of verbal thickets which must be penetrated and are impenetrable without considerable labor" and that "the meaning is indeed obscure without a good deal of effort". Now if four Judges could not agree as to the clarity of this Section; if in the opinion of the District Judge this Section "is direct and explicit" and if in the opinion of the Judges of the Court of Appeals the

meaning of this Section is "impenetrable without considerable labor", what should a layman landlord do when he is requested by the Housing Expediter to part with his property (and the rent is his property). Shouldn't such layman landlord before parting with his property ask: whether there is any law that compels him to part with his property? And when such landlord reads Section 204(b)(3), can he say to the Housing Expediter: "You are right. There is a clear law compelling me to part with my property."

If the law is such "that it demands somewhat exacting scrutiny" and "is indeed obscure without a good deal of effort" shouldn't such landlord tell the Housing Expediter that there is no law to compel him to part with his property and there is no due process that requires him to part with his property.

The United States Court of Appeals found that subdivisions 2 and 3 overlap each other (Record, fols. 39, 40) and that the meaning of the law is obscure. Therefore, such law would come within "the line of cases that hold that due process permits deprivation of property only by a direct and explicit law, and not otherwise", which line of cases was called by the District Judge (Record, fol. 19) "Good hornbook law". Surely the decision of *U. S.* v. *Ballard,* 12 F. Supp. 321, that the Statute which is:

> "in terms so vague that men of common intelligence must necessarily guess its meaning and differ as to its application violates the first principles of due process of law" • • • is applicable here.

The opinion of the United States Court of Appeals is that such obscurities are protecting the individual "against what without them would be the fiat of minor officials" (Record, fol. 40). On the contrary these obscurities will leave the individual without protection

against the acts of minor officials. In general, a law should be phrased in language so clear as to be equally understood by individuals and officials without any reference to the legislative history. The history of a law cannot help in cases where citizens are deprived of their property by an Act of Legislation which is ambiguous and obscure. Very often the intention of the legislature may be to achieve a certain effect, but the law *as written* does not produce such effect.

The contention of the appellants is that the Section 204(b)(3) does not by its verbal meaning give the power to deprive this landlord of its rent in a valid lease entered into by it pursuant to permission of subsection 204(B) of the Housing and Rent Act of 1947.

When a citizen is asked to sacrifice his property the first question is whether there is a distinct and explicit law to that effect. It is not enough to say to the citizen that the history of the law should show the intention to deprive him of his property. The citizen has a right to insist that he wants to have a law and not the history of a law to that effect. The citizen could say that he does not care what the history of the law may have been but that he does care only whether there be a *direct and explicit* law depriving him of his property, and that if there be no such law he should not be deprived of his property.

It is repeated that in this case there is no such law: there is only a series of "verbal thickets" to be penetrated, which is insufficient to constitute due process.

In this respect recently the Appellate Division for the First Department of the State of New York in the matter of the application of *Rutherford Estates, Lim.* (decided May 23, 1950, printed in the New York Law Journal on June 22, 1950), stated concerning interpretation of Emergency Rent Laws:

> "Whatever may have been *the intention of that commission* at the time the amendment was sug-

gested, the amendment *as adopted* expressly embraced pending proceedings without qualification."

In other words, the Appellate Division said that the Emergency Rent Law should be applied *as written* and not to be interpreted according *to the history* of the law.

In the present case the Section 204(b)(3) of the Housing and Rent Act of 1949 *as written* does not invalidate the two aforementioned leases entered into by the defendant 25 Trinity Corporation with two 1948 tenants: Halpin and Martin.

POINT C.

The United States Court of Appeals for the Second Circuit erred in not holding that according to the evidence presented by the plaintiff-appellee Section 204(b)(3) of the Housing and Rent Act of 1949 was intended to be enacted in breach of a previous guaranty by the legislation and as such could not constitute due process of law.

The plaintiff-appellee admits that the Housing and Rent Act of 1947 guaranteed the landlords that if they entered into leases expiring on or after December 31, 1948, there would be no more limitations on the rent amount agreed between them and the new tenants after January 1, 1948. But the plaintiff-appellee tried to show that in 1949 Congress intended to enact a law in breach of this guaranty. When a plain citizen breaks his promise, sometimes we have a remedy against him and sometimes we have not. But if the Legislation breaks its promise then we have protection in the Constitution. Any law that was enacted in breach of a previous guaranty would not be a law conforming to the due process clause of the Constitution. All the previous decisions that impaired contracts cover quite different situations,

to-wit: Normal life in the country and an ensuing emergency, followed by necessary legislation to impair contracts to cope with the emergency. But *here we have a different situation.* Here we had an emergency in 1942 followed by a necessary legislation in 1943 to impair contracts to cope with the emergency. And then in the diminished emergency of 1947 Congress gave a certain guaranty to protect in certain cases property rights of landlords in the future. Relying on this guaranty landlords expended considerable amounts of money to induce the tenants to enter into new leases and it is alleged by the plaintiff that Congress by a new legislation 2 years later and after abatement of the emergency tried to impair these contracts and to abrogate the property rights of the landlords, in breach of its previous guaranty to the contrary. This situation is not covered by the decisions of the courts permitting emergency legislation to impair contractual and property rights. This is *a novel question* not covered by any previous decisions and this is a situation in which due process of law will not permit the impairment of contracts and property rights in violation of Fifth and Fourteenth Amendments. The United States Court of Appeals was wrong in not considering the novelty of the situation. Certainly it is not argued by plaintiff that the housing emergency in 1949 was greater or more acute than in 1947.

The United States Court of Appeals made another error in considering that the right acquired under the Housing and Rent Act of 1947 was *"privileged exceptions"* to the landlords. It was not "privileged exceptions". The landlords obtained this right at considerable expense; and if it cost them thousands of dollars in improvements to persuade the tenants to enter into new leases it was not a privilege: it was a statutory right acquired by them at heavy evpense on their part.

POINT D.

The United States Court of Appeals for the Second Circuit erred in not holding that according to the plaintiff-appellee's contention Section 204(b)(3) of the Housing and Rent Act of 1949 might be considered intended as class legislation and therefore unconstitutional.

The plaintiff-appellee tried to show that the intention of the Congress was to vitiate the leases made between January 1st and April 1st, 1948. This would constitute a singling out of one type of property to be affected by the law and as such would not afford the equal protection of the law to all types of property, in violation of the constitutional guaranty of the equal protection of the law. It would mean that Congress tried to single out one individual type of property where leases were entered into between January 1st and April 1st, 1948, and to deprive such property owner of his contract right while allowing other classes of decontrolled rents not to be affected by the new law.

It would be similar to a class legislation, which is not favored by our courts. It would be like singling out two apartments from the 32 in the house and to make special law for these two apartments. If this is the situation the new law could arbitrarily provide that the rental should be reduced in certain dwellings or in certain apartments or in other units of property. Such law would be unconstitutional and if indeed Section 204(b)(3) had in view *to single out* the leases made between January 1st and April 1st, 1948, this Section would not be valid.

The plaintiff-respondent and the Court of Appeals tried to excuse such Act of Legislation *by an emergency.* There was no emergency. Only a few thousand landlords and tenants have been affected by the leases entered into between January 1st and April 1st, 1948. It

is evident that these few thousand affected people among 150 million of the population of the United States could not constitute *an emergency* for the country. The decision of *Schechter Corporation* v. *United States,* 295 U. S. 495, should be applied here. The Court said in that decision:

(p. 528):

> "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power."

(also 290 U. S. 398, 426, *Home Bldg. and Loan Ass'n* v. *Blaisdell, et al.*)

POINT E.

The United States Court of Appeals erred in not holding that the decisions cited in the opinion of the District Judge are not applicable to the instant case and do not constitute due process in the instant case.

The decisions cited by the District Judge in his opinion (Record, fol. 19), to-wit: *Taylor* v. *Brown,* 137 F. 2nd 654 and *Cobleigh* v. *Woods,* 172 F. 2nd 167, are not applicable here. The decisions of *Cobleigh* v. *Woods* concerns itself with leases made between July 1st and July 25th, 1946, and tried to uphold the continuity of the rent laws during the interim period of these 24 days. The Court recognized that the leases made in this period of 24 days are covered by the law enacted on July 25th (as of July 1st), because as Justice Magruder said in that decision *"The statutory language is crystal clear."* I doubt that anyone could consider that the statutory lan-

guage of the Section 204(b)(3) of the Housing and Rent Act of 1949 is "crystal clear." The United States Court of Appeals itself said that this section is full of "verbal thickets" (Record, fol. 40).

The case of *Taylor* v. *Brown* covers an entirely different situation. On page 661 it is said "it must be borne in mind that the Emergency Price Control Act dealt with an emergency in which immediate action by the Administrator was of the first importance and preliminary restraint might well prove disastrous." I leave this Court to decide whether it will *prove disastrous*, if Mr. Martin and Mr. Halpin and some few other tenants with leases from January 1 to April 1, 1948, would continue to pay the rent *provided in their leases.* It would be more logical to follow the recent decisions of the Federal Courts decided at the end of 1947 and in the year 1948 when the war was over and conditions became normal. A few of them are as follows:

Johnson v. *U. S.*, 79 F. Supp. 208.

(p. 211):

> "Moreover, in those fields where from the grant of power there is to be implied the power to impair the obligation of contracts, this power must nevertheless be exercised subject to limitations of the 5th Amendment of the Constitution. *Louisville Joint Stock Land Bank* v. *Radford, supra.* This Amendment prohibits the taking of private property for public use without just compensation. A contractual right comes within its protection. *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312."

Miller v. *Howe Sound Min. Co.*, 77 F. Supp. 540.

(p. 545):

> "The contract clause does not, directly, apply to the Federal Government, it is true, but valid con-

tracts are property and rights arising out of them are protected by the due process clause of the Fifth Amendment, which is a limitation on the powers of the Federal Government. *Lynch* v. *U. S.*, 202 U. S. 571, 579 * * * If, therefore, the States are prohibited by the contract clause from destroying contract rights * * * it would seem that the Federal Government, likewise, is foreclosed by the Fifth Amendment from doing the same thing with respect to vested property rights."

Seese v. *Bethlehem Steel Co.*, 74 F. Supp. 412.

(p. 417):

"Retrospective legislation is generally not favored by the courts and where there is an open question of construction of a statute with respect to whether it should be applied restrospectively it will only be so applied where it clearly does not impinge upon constitutional protection."

The decision of *Miller* v. *Howe Sound Min. Co.*, 77 F. Supp. 540, suggests a solution of the question if the Government wants to take private rights from citizens without any extraordinary emergency. The solution is a very simple one: if the rights are taken away the Government should pay for them, and in this way spread the expense among all the taxpayers in the United States. In the opinion of the Court only then there will be compliance with the Fifth Amendment. There can be no doubt that to decrease the rents reserved in a valid lease is to take away property lawfully belonging to the landlord and has effect of cancelling a valid obligation of the tenant and enriching the tenant at the expense of the landlord.

POINT F.

The United States Court of Appeals for the Second Circuit erred in not holding that Section 204(b)(3) is not applicable to the lease in question.

The United States Court of Appeals for the Second Circuit found that Section 204(b)(3) applies to this case. This is an error. This section begins with the words: "in any case in which a valid written lease with respect to any housing accommodations was entered into and filed in accordance with the provisions of this subsection (b) as then in effect."

It is peculiar that the law says "in any case" instead of "in every case" which would be a sweeping definition. "In any case" means simply "in the case." Congress did not write into the law *"in every case"* but *"in any case."* It is the duty of the plaintiff to prove that the Statute means "in every case" and the plaintiff cannot prove that, because the Statute does not say so. Section 204(b)(3) could be applied only in the case of the former two 1947 tenants of the apartments #204 and #402, Mr. Moses and Mr. Reichert, if they should complain on the increase in the rent. But at the present time the Court has before it *not the leases of these two former 1947 tenants* but the leases of *two new 1948 tenants,* Mr. Martin and Mr. Halpin, which leases do not come within the provisions of Section 204(b)(3).

The Section 204(b)(3) of the Rent Act of 1949 according to its wording is to be applied only "in any case" of a lease made before December 31, 1947 and does not touch or mention the leases made after December 31, 1947, as these two leases in question, just as these two leases *have not been touched or mentioned* by the Rent Act *of 1948.*

That Section 204(b)(3) is confusing and could not constitute due process of law is evident when we compare

this section with Section 204(b)(2) with which the United States Court of Appeals said it overlaps (Record, fol. 39).

Section 204(b)(3) states that it applies to a lease which "hereafter terminates or expires" and Section 204(b)(2) states that it applies to a lease which is "in effect on the effective date of the Housing and Rent Act of 1949." Is it not the same? Surely, the lease that is *in effect on the date* of the Rent Act of 1949 is the lease "that hereafter terminates or expires". In other words either we should believe that the law is written very loosely and is repetitious, or we should find that these two sections should apply to different kinds of leases. We should not presume that the law is badly written and repetitious as the United States Court of Appeals has found. The only way out of this "verbal thicket" is to say that Section 204(b)(3) should apply to the leases made *before December 31, 1947* and the Section 204(b)(2) should apply to the leases made after *December 31, 1947* (as are the two 1948 leases under the Court's consideration). Otherwise we should recognize that the law is very loosely written and "indeed obscure" and as such is violating due process of law, because it confiscates the defendant's property without being *direct and explicit.*

POINT G.

The United States Court of Appeals for the Second Circuit erred in not applying in this case the Section 204(b)(2) of the Housing and Rent Act of 1949.

This section reads as follows:

> "(2) *In any case* in which a valid written lease with respect to any housing accommodations was entered into and filed in accordance with the provisions of this subsection (b) as then in effect, and such lease *was in effect* on the effective date of the

> Housing and Rent Act of 1949, such housing accommodations shall be subject to the provisions of this title and, until such lease is terminated or expires, the maximum rent for said accommodations shall be *the rent set forth in said lease.*"

The leases of Messrs. Martin and Halpin are entirely within this section. They *were in effect* on the effective date of the Housing and Rent Act of 1949, and they were filed in accordance with the provisions of the subsection (b) as then in effect, *i. e. within 15 days after date* of execution of such leases.

POINT H.

The United States Court of Appeals for the Second Circuit erred in not applying to this case Regulation of the Housing Expediter 825.24 (b) and Paragraph 3 of the "Rent Control Facts for Landlords" issued by the Housing Expediter.

Said Regulation 825.24 (b) reads as follows:

> "For housing accommodations concerning which a statutory lease is in effect the maximum rent, until such lease is terminated or expires, shall be the rent set forth in such lease."

Paragraph 3 of the "Rent Control Facts for Landlords" states:

> "3. Units under an effective rent increase lease made in 1947 or 1948. The lease rent becomes the new maximum rent."

This means that lease rent in the present case *is the maximum legal rent.*

The two leases in question have been statutory leases. They could not be entered into *but for the statute,* to-wit: subsection 204(B) of the Housing and Rent Act of 1947 permitting such leases.

POINT I.

The United States Court of Appeals erred in not holding that the two leases made by the defendant, 25 Trinity Corporation, are valid leases and the rental mentioned in these leases is the maximum legal rent which the defendant, 25 Trinity Corporation, has the right to collect from the above-mentioned two tenants after April 1, 1949.

Subsection 204(B) of the Housing and Rent Act of 1947 provided as follows:

> "No housing accommodations for which a maximum rent is established pursuant to the provisions of the last proviso above *shall be subject,* after December 31, 1947, *to any maximum rent* established, or maintained under the provisions of this title."

Pursuant to subsection 204(B) the defendant, 25 Trinity Corporation, and the above-mentioned two tenants entered into two leases in January, 1948, with one tenant from February 1, 1948 to September 30, 1949, altogether for twenty months, for an apartment consisting of four light, large, modern rooms, for a reasonable total rent of $2,000.00, to be paid in equal monthly payments of $100.00 each, and with the other tenant from January 1, 1948 to December 31, 1948, altogether for twelve months, for an apartment consisting of six light, large, modern rooms, for a reasonable total rent of $1,800.00, to be paid in equal monthly payments of $150.00 each. Pursuant to Clause 11 of this lease, the lease was extended to December 31, 1949.

The Office of the Housing Expediter deemed these leases to be valid only until April 1, 1949, but from April 1, 1949, requests that the rent be reduced to the rent of previous leases filed before in the year 1947 entered into with prior different tenants.

If for the sake of argument we will suppose that the landlord collected *the whole amount* mentioned in the leases *at the time of the execution* of the leases, as it had the right to do under subsection 204(B) of the Housing and Rent Act of 1947, it is evident that the Housing Expediter could not ask for the refund of part of the money because at the time of collection, the landlord *had the right to collect* the whole amount mentioned in the leases. Therefore, if the landlord agreed to take the payment in monthly installments the installment payments should not be cut down.

From the above it is evident that the apartments were leased not for a monthly rent, but for a *total rent* in the case of Mr. Halpin for $1,800 and in the case of Mr. Martin for $2,000. At the time of entering into the agreement, the landlord and tenant were permitted to agree *to any rental.* Therefore, the sums of $1,800 and $2,000 agreed upon were lawful sums due to the landlord in consideration of estate for years granted to each above mentioned tenant. As stated before, assuming that the landlord had collected this total rent at the time of entering into the leases *as it was permitted by the law at that time,* would the Housing Expediter now try to break the lawful agreement between landlord and tenant made in January, 1948, and request the landlord to return part of the money lawfully received by it in January, 1948? Defendants do not suppose the Housing Expediter would have any such right. Both leases being for a *stated amount of total rent,* they were not at the time of execution of the leases and therefore are not now under the supervision of the Housing Expediter as *to the installments due.* This indicates the error of plaintiff's con-

tention that the installments due under these leases should be reduced from April 1, 1949.

To further illustrate this point let us suppose that Mr. Halpin gave to landlord in full payment of $1,800 agreed upon in January 1948 twelve promissory notes each in the amount of $150, payable in series at intervals of one month thereafter: Would the Housing Expediter issue a directive reducing the face value of these notes maturing after April 1, 1949 under authority of Section 204(b)(3)?

And let us further suppose that Mr. Martin gave to landlord in full payment of $2,000 agreed upon in January 1948, a Buick automobile valued at $2,000; what directive would the Housing Expediter issue under authority of Section 204(b)(3) according to his interpretation of that section after April 1, 1949—to return a part of the car to the tenant?

These illustrations plainly disclose the fallacy of plaintiff's contention.

POINT J.

The United States Court of Appeals for the Second Circuit erred in not holding that no relief for injunction should be granted in this action or said relief should be in a different scope.

The substance of this action is to ascertain whether *the interpretation* of the law by the Housing Expediter is correct or whether the defendants have *correctly* interpreted the law.

The president of the defendant, 25 Trinity Corporation, is the co-defendant, Alexander Porhownik, who is a Counselor at law, for many years admitted to the Bar of the State of New York and to practice before the Southern and Eastern Districts of the United States District Court of New York and before the United States Court of Appeals for the Second Circuit.

The standing of Alexander Porhownik, as a member of the State Bar and Federal Bars makes it inconceivable that if the final decision of the Federal Courts will be to the effect that the interpretation of the law by the Housing Expediter is correct, that a member of the State and Federal Bars would not obey such decision of the Federal Court, without an injunction.

This Court could be assured that its final decision in this case will be obeyed by the defendants without the necessity of any injunction. Moreover, the injunction granted by the Court is much broader than expressed in the opinion of the District Judge (Record, fol. 19). It does not refer only to the collection of rent "in excess of the maximum legal rents" but includes many humiliating provisions as to the heat, light etc. not based on the facts of the case.

It may be also added that the question of injunction is becoming now a mere academic one as the present Rent Act expires in a few months on December 31st of this year.

POINT K.

The United States Court of Appeals for the Second Circuit erred in not holding that the provision of the Housing and Rent Act of 1949 that the plaintiff is not subject to costs makes undue difference between the parties to the action and violates due process of law.

According to this provision even in an unreasonable action by the Housing Expediter the defendant will have expenses *but no redress.*

POINT L.

The United States Court of Appeals for the Second Circuit erred in not holding that the Housing and Rent Act of 1949 is unconstitutional.

This Act was enacted by Congress under War Powers in the time when no war existed in fact.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its Supervision powers by granting a Writ of Certiorari and thereafter reviewing and reversing said decision and judgment.

Alexander Porhownik and
Albert Viault,
Counsels for Petitioners.

Lyman Stansky, Esq.,
Naomi Wheeler, Esq.,
As of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:

Fleming v. *Rhodes*, 331 U. S. 100	8
Philadelphia Coke Co. v. *Bowles*, 139 F. 2d 349	8
Taylor v. *Brown*, 137 F. 2d 654	8
United States v. *Shoreline Cooperative Apartments, Inc.*, 338 U. S. 897, rehearing denied, 338 U. S. 939	9
Woods v. *Miller Co.*, 333 U. S. 138	9

Statues and Regulations:

Housing and Rent Act of 1947 (61 Stat. 193)	3
Section 204(b)	3, 7, 11
Housing and Rent Act of 1948 (62 Stat. 93, 50 U.S.C. App., Supp. II, 1881 *et seq.*)	4
Section 204(b)(2)	6, 7, 12
Section 204(b)(3)	13
Housing and Rent Act of 1949 (63 Stat. 18)	4
Section 204(b)(2)	7, 14
Section 204(b)(3)	6, 7, 14
Housing and Rent Act of 1950 (Public Law 574, 81st Cong., 2d Sess., approved June 23, 1950)	9
Controlled Housing Rent Regulation (12 F.R. 4331)	3

Miscellaneous:

H. Rep. 215, 81st Cong., 1st Sess.	8
95 Cong. Rec. 2182, 2860	8

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 197

ALEXANDER PORHOWNIK AND 25 TRINITY CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 15) is unreported. The opinion of the Court of Appeals (R. 36) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1950 (R. 42), and the order denying rehearing was entered on June 9, 1950 (R. 50). The petition for a writ of certiorari was

filed on July 13, 1950. Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below correctly construed the provisions of Sections 204(b)(2) and (3) of the Housing and Rent Act of 1949 as requiring that the maximum rents for petitioners' housing accommodations be reestablished at 1947 rent levels rather than at 1948 decontrolled rates.

2. Whether Section 204(b)(3) of the Housing and Rent Act of 1949 is violative of the due process clause of the Fifth Amendment.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra,* pp. 11-15).

STATEMENT

The question raised is whether maximum rents initially established under federal rent control and thereafter released from control for a limited period, became reestablished at the initial maximum rates or at higher decontrolled rates. Petitioners' position is that the higher decontrolled rates became the maximum rates when rent control was reestablished; respondent claims that the rents were rolled back to their former levels.

Petitioner 25 Trinity Corporation is the owner of an apartment house located at 21 and 25 Trinity Place, Montclair, New Jersey; petitioner Alex-

ander Porhownik is the President of 25 Trinity Corporation (R. 8, 9). The present case is concerned with two apartment units, Nos. 204 and 402, in that house. On July 1, 1947, the maximum rent established under the Housing and Rent Act of 1947 (61 Stat. 193), hereinafter called "the Act of 1947", for apartment 204 was $100.00 per month. On August 30, 1947, the corporation entered into a statutory lease pursuant to Section 204(b) of the Act of 1947 (*infra*, pp. 11-12)[1] for a rental of $115.00 per month for the period ending December 31, 1948 (R. 33-34). The lease was filed in accordance with the Act of 1947 and the Regulation [2] promulgated thereunder (R. 15). The rental situation as to the second apartment, No. 402, was similar. On August 14, 1947, the corporation entered into and duly filed a statutory lease pursuant to the same provisions of the Act of 1947 thereunder increasing the maximum rent from $60.00 to $69.00 per month, for a period ending December 31, 1948 (R. 32-33). Shortly after December 31, 1947, the two leases

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[1] These statutory provisions permitted a landlord and tenant voluntarily and in good faith to enter into a written lease for housing accommodations at a rental of not more than 15% above the existing maximum rent if (1) the lease were entered into not later than December 31, 1947, and expired on or after December 31, 1948, and (2) a true and duly executed copy of the lease were filed with the Housing Expediter within 15 days after its execution. Housing accommodations subject to such a "statutory" lease were not subject to maximum rent regulation after December 31, 1947 under the Act as then in effect.

[2] The Controlled Housing Rent Regulation (12 F.R. 4331), also effective July 1, 1947.

were voluntarily terminated (R. 33, 34) and the two units thereupon were no longer subject to the establishment of maximum rents under the Act as it then stood; for all practical purposes, the two units were thereupon decontrolled. In January 1948, the corporation entered into leases with new tenants at a rental of $150.00 per month for apartment 204 and $100.00 per month for apartment 402; the expiration dates of both leases were later than April 1, 1949 (R. 33, 34). Copies of the leases were forwarded to the Housing Expediter, although filing was neither required nor provided for since the apartments were not subject to control (R. 16, 33).

On April 1, 1948, the Act of 1947 was amended (Act of March 30, 1948, 62 Stat. 93). The amendments preserved the validity of statutory leases entered into under the Act of 1947; they provided for reimposition of maximum rents in cases in which such leases were terminated or expired between April 1, 1948 and March 31, 1949, but did not reimpose controls in cases, like that here presented, in which the leases had been terminated between January 1 and March 31, 1948.[3] By the Act of 1949, effective April 1, 1949 (Act of March 30, 1949, 63 Stat. 18), however, Congress adopted the provisions here in issue which

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[3] The amendments also authorized entry into new statutory leases during 1948. Property so leased would similarly become subject to maximum rent restrictions if the lease was terminated prior to March 31, 1949.

the Housing Expediter and both courts below have construed as reimposing maximum rent restrictions on any housing accommodations with respect to which statutory leases had theretofore expired.

Respondents continued to charge the higher decontrolled rates after April 1, 1949 (R. 4). Since the Housing Expediter was of the opinion that prospective maximum rents (on and after April 1, 1949) for the two housing units here of interest were rolled back to $115.00 per month for apartment 204 (rather than the $150.00 decontrolled rent) and $69.00 per month for apartment 402 (rather than the $100.00 decontrolled rent) suit was instituted against respondents in the United States District Court (Southern District of New York) for injunction and restitution of overcharges (R. 26, 32). The trial court awarded restitution to the tenants of overcharges in rents paid after April 1, 1949 and enjoined petitioners from thereafter charging more than the prescribed maximum rents (R. 20). The United States Court of Appeals for the Second Circuit affirmed (R. 36).

ARGUMENT

The decision of the court below is correct, and there is no conflict of decisions. Moreover the questions which petitioner seeks to raise could at most affect only a very limited class of cases.

1. The court below correctly held that the rentals charged by petitioners after March 31,

1949 were made subject to 1947 rent levels by Section 204(b)(3) of the Act of 1949 (*infra*, p. 14).

The use of so-called 15% (statutory) leases reflects an experiment in decontrol which the Congress employed in the 1947 and 1948 rent-control legislation, but rejected in 1949. Initially, in the Act of 1947, Congress offered landlords the opportunity of obtaining a 15% increase in rentals and decontrol after December 31, 1947, in return for at least one year's lease protection to the tenant. Under this provision rents would normally be held down for at least a year by the terms of the lease; but this restriction might be removed by the fortuitous circumstance that the lease was validly terminated before its expiration date. Such a circumstance took place in the instant case. The 1947 statutory leases for the two described apartments aborted in January 1948 and petitioners were thereby permitted to establish rentals at any amounts desired, with or without leases. The new, 1948, rents at 50% and 66⅔% above the initial maximum rents reflected the free exercise of that right. As the April 1, 1948 amendments to the Act of 1947 permitted petitioners' accommodations to remain free of control,[4] the higher rents could validly continue

[4] This was made evident by the provision that housing accommodations subject to a lease entered into on or before December 31, 1947, remain free of control unless the lease is "hereafter terminated" (i.e., after the effective date of the Act of 1948, April 1, 1948) or expires before March 31, 1949.

to be charged until April 1, 1949. The Act of 1949, however, effected substantial changes in such rental arrangements.

The effect of the 1949 Act on such arrangements is clear and explicit. Section 204(b)(2) of that Act (*infra*, p. 14) provides that where a valid statutory lease was in effect on the effective date of the 1949 Act, the maximum rent shall, until the lease expires or is terminated, be that set forth in the lease. That provision, as the courts below held, has no application here, for petitioners' existing leases were entered into at a time when the units in question were not subject to maximum rent control, and hence those leases were clearly not the statutory leases referred to by this provision.[5] Section 204 (b)(3) (*infra*, p. 14) deals with the situation where a statutory lease was at one time in effect but "has heretofore terminated or expired or hereafter terminates or expires." In such a case, the maximum rent is that which had been prescribed by the statutory lease when it was in effect, with modifications not here

[5] Section 204(b)(2) is limited to cases in which the existing lease was "entered into and filed in accordance with the provisions of this subsection (b) as then in effect". Petitioners' leases, having been entered into in January, 1948, were not entered into "on or before December 31, 1947" as required by Section 204(b) of the 1947 Act, nor did they take effect "on or after the effective date [April 1, 1948] of" the 1948 Act as required by Section 204(b) of that Act. And they plainly did not provide for a rental not in excess of 15 percent of the maximum controlled rent as required by both acts. Since the leases were clearly not entered into pursuant to either the 1947 or 1948 Act, the purported filing of them with the Expediter was, as the court below held, a "nullity" (R. 39).

material. As both courts held, this provision exactly covers the present case. Here a valid statutory lease was entered into and filed in 1947 pursuant to the provisions of the 1947 Act and that lease "has heretofore terminated". Hence the applicable maximum rent is that set forth in the 1947 lease. The result is entirely reasonable and one which Congress plainly intended. See H. Rep. 215, 81st Cong. 1st Sess. p. 5; 95 Cong. Rec. 2182, 2860.

2. The burden of petitioners' argument of unconstitutionality is (1) that Section 204(b)(3) is so unclear as to be fatally defective (Pet. 13-20), and (2) that the Congress may not withdraw an exemption once granted (Pet. 20-21). The foregoing discussion shows, however, that, as the trial court said, "Section 204(b)(3) is direct and explicit and applicable to this case" (R. 19). In the words of the Court of Appeals, there is no "uncertainty in the standard to be applied" (R. 40). And it is plain that the removal of these properties from control by the 1947 Act did not oust Congress of its continuing jurisdiction to reimpose controls prospectively whenever they were deemed needed, nor did the fact that petitioners' 1948 leases were valid when made destroy Congress' power to prescribe lower maximum rentals for the future. *Fleming* v. *Rhodes,* 331 U.S. 100, 107; *Taylor* v. *Brown,* 137 F. 2d 654, 659 (Em. App.); *Philadelphia Coke Co.* v. *Bowles,*

139 F. 2d 349, 356-7 (Em. App.). Petitioners' contention that the Act cannot be sustained as an exercise of a war power is equally without merit. *Woods* v. *Miller Co.*, 333 U.S. 138; *United States* v. *Shoreline Cooperative Apartments, Inc.*, 338 U.S. 897, rehearing denied, 338 U.S. 939.

3. It is extremely unlikely that the questions here raised will be presented again. The issue can arise only as to property with respect to which a statutory lease was entered into during 1947 and was terminated between December 31, 1947 and April 1, 1948. No similar case has been considered by a United States Court of Appeals. Neither the Act of 1949 nor the most recent amendment of that Act (Public Law 574, 81st Cong., 2d Sess. (June 23, 1950)) permit the execution of 15% statutory leases or can cause a situation like the present one to arise.

CONCLUSION

The decision of the court below is clearly correct and further review is not warranted. There is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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AUGUST, 1950.

APPENDIX

1. Section 204(b) of the Housing and Rent Act of 1947 (61 Stat. 193):

(b) During the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further to carry out the purposes and provisions of this title: *And provided further,* That in any case in which a landlord and tenant, on or before December 31, 1947, voluntarily enter into a valid written lease in good faith with respect to any housing accommodations for which a maximum rent is in effect under this section and such lease takes effect after the effective date of this title and expires on or after December 31, 1948, and if a true and duly executed copy of such lease is filed, within fifteen days after the date of execution of such lease, with the Housing Expediter, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, that which is mutually agreed between the landlord and

tenant in such lease if it does not represent an increase of more than 15 per centum over the maximum rent which would otherwise apply under this section. In any case in which a maximum rent for any housing accommodations is established pursuant to the provisions of the last proviso above, such maximum rent shall not thereafter be subject to modification by any regulation or order issued under the provisions of this title. No housing accommodations for which a maximum rent is established pursuant to the provisions of the last proviso above shall be subject, after December 31, 1947, to any maximum rent established or maintained under the provisions of this title.

2. Sections 204(b)(2) and (3) of the Housing and Rent Act of 1948 (62 Stat. 93, 50 U.S.C. App., Supp. II, 1894 (b)(2) and (3):

(2) In any case in which a landlord and tenant, on or before December 31, 1947, in accordance with the provisions of this subsection as then in effect, voluntarily entered into a valid written lease in good faith with respect to any housing accommodations, such housing accommodations shall not be subject to any maximum rent established or maintained under the provisions of this title unless such lease is hereafter terminated or expires before March 31, 1949, in which case the maximum rent for such housing accommodations shall, through March 31, 1949, be not in excess of 15 per centum over the maximum rent which in the absence of a lease would be

in effect with respect thereto on the date of enactment of the Housing and Rent Act of 1948: *Provided,* That the landlord and a tenant (including any new tenant) may enter into a new voluntary lease subject to the conditions, specified in paragraph (3) of this subsection, applicable with respect to landlords and tenants who have not heretofore entered into voluntary leases, except that no maximum rent need be in effect on the date of execution of such new lease.

(3) In any case in which a landlord and tenant (including any new tenant) on or before December 31, 1948, voluntarily enter into a valid written lease in good faith (at any rental agreed upon in the lease, but not in excess of 15 per centum over the maximum rent which in the absence of a lease would be in effect with respect thereto on the date of enactment of the Housing and Rent Act of 1948) with respect to any housing accommodations for which a maximum rent is in effect under this section, and such lease takes effect on or after the effective date of the Housing and Rent Act of 1948 and expires on or after December 31, 1949, and if a true and duly executed copy of such lease is filed, within fifteen days after the date of execution of such lease, with the Housing Expediter, such housing accommodations shall not thereafter be subject to any maximum rent established or maintained under the provisions of this title unless such lease is terminated before March 31, 1949. If any such lease is so

terminated the maximum rent (unless a subsequent lease entered into under the provisions of this paragraph is in force) shall be not in excess of 15 per centum over the maximum rent which in the absence of a lease would be in effect with respect thereto on the date of enactment of the Housing and Rent Act of 1948.

3. Sections 204(b)(2) and (3) of the Housing and Rent Act of 1949 (63 Stat. 18):

(2) In any case in which a valid written lease with respect to any housing accommodations was entered into and filed in accordance with the provisions of this subsection (b) as then in effect, and such lease was in effect on the effective date of the Housing and Rent Act of 1949, such housing accommodations shall be subject to the provisions of this title and, until such lease is terminated or expires, the maximum rent for said accommodations shall be the rent set forth in said lease.

(3) In any case in which a valid written lease with respect to any housing accommodations was entered into and filed in accordance with the provisions of this subsection (b) as then in effect, and such lease has heretofore terminated or expired or hereafter terminates or expires, such housing accommodations shall be subject to the provisions of this title and the maximum rent for said accommodations shall be the rent set forth in said lease, plus or minus applicable individual adjustments: *Provided, however,* That if such housing ac-

commodations are in a defense-rental area in which a general increase in maximum rents has been or is hereafter granted, the maximum rent shall be said lease rent plus or minus applicable individual adjustments, or the maximum rent in the absence of a lease, whichever is higher.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

ALEXANDER PORHOWNIK and 25 TRINITY CORPORATION, *Petitioners,*

v.

UNITED STATES OF AMERICA,

No. 197.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF.

POINT I.

The brief for respondent is insufficient. It does not answer the points raised by the petitioners and does not cover sufficiently the law on the subject.

Petitioners' brief in specification of errors indicated *12 errors* by the United States Court of Appeals for the Second Circuit in the case under consideration. But the respondent's brief covers only errors numbered as 2, 6, 7, 9 and 12. That indicates that the respondent could not controvert the other seven errors indicated in the petitioners' brief.

POINT II.

Respondent admits in the brief that there was no emergency situation that would warrant the breach by Congress of a previous guaranty given to the landlords by the subsection 204 (B) of the Housing and Rent Act of 1947.

The respondent in its brief stated on page 5:

> "Moreover the questions which petitioner seeks to raise could at most affect only a very limited class of cases",

and on page 9:

> "It is extremely unlikely that the questions here raised will be presented again. The issue can arise only as to property with respect to which a statutory lease was entered into during 1947 and was terminated between December 31, 1947 and April 1, 1948."

The United States Court of Appeals for the Second Circuit found that Congress in 1949 abrogated the right given to the landlords by the subsection 204 (B) of the Housing and Rent Act of 1947 (which right was acquired by the landlords at a cost of many thousands of dollars in improvements) on the ground that:

> "To permit those, who are in possession of an inadequate supply, to exploit their advantage without restraint *may lead to the gravest disturbances.*"

But now from the respondent's brief it follows that there could be no "gravest disturbances" because the respondent's brief states that this case "could at most affect only a very limited class of cases" (Respondent's Brief, p. 5).

It is apparent that if there was no emergency, an impairment of landlords' rights afforded to them by the subsection 204 (B) of the Housing and Rent Act of 1947 will be violative of the Fifth and Fourteenth Amendments.

POINT III.

There is a controversy between the District Court and the Court of Appeals as to the clearness of Section 204 (b)(3) of the Housing and Rent Act of 1949, which controversy should be cleared up by the United States Supreme Court.

Respondent's brief states (p. 8) that the Trial Court said:

> "Section 204 (b)(3) of the Housing and Rent Act of 1949 is direct and explicit and applicable to this case" and that the Court of Appeals also found that "there is no uncertainty in the standard to be applied."

The Trial Court indeed wrongly found that Section 204 (b)(3) of the Housing and Rent Act of 1949 is *direct and explicit* but the three learned judges of the Court of Appeals found the same section to be "full of verbal thickets which must be penetrated and are inpenetrable without considerable labor", that "the meaning is indeed obscure without a good deal of effort" and that "the proper understanding of the language does demand a somewhat exacting scrutiny" (Record, fol. 40).

The only way to clear up this divergence of opinion between the District Court and the United States Circuit Court as to the clarity of the Section 204 (b)(3) is to grant the writ of certiorari and to decide whether this section is a clear one or is just a mass of "verbal thickets", which will bring this section under the rule stated in the

case of *U. S.* v. *Ballard,* 12 F. Supp. 321, that a statute which is:

> "in terms so vague that men of common intelligence must necessarily guess its meaning and differ as to its application violates the first principles of due process of law."

It is respectfully added that though the present case concerns only two leases from 31 leases entered into by the petitioner, 25 Trinity Corporation and its tenants, the present case is nevertheless *a test case* involving the rights of several thousand landlords who are in the same position as the petitioner, 25 Trinity Corporation. The decision by the United States Supreme Court therefore will clear the position not only for the petitioner *but for the several thousand other landlords* in similar circumstances.

CONCLUSION.

The Writ of Certiorari Should Be Granted.

Respectfully submitted,

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